Supreme Court, U.S.
FILED

Case No. 09-1558

# IN THE SUPREME COURT OF THE UNITED STATES

LORENE YOUNG

Petitioner,

v.

CARGILL

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

## REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Is Cargill entitled to summary judgment as a matter of law?

Whether Cargill is entitled to Employer Immunity based on Florida's Workers Compensation Act Section 440.11 (2) Fla. Stat. §440.01- 440.60 (2000).

Was Lorene Young considered an employee of Cargill?

Did Cargill know or should have known of the dangers of the use Anhydrous Ammonia.

Did the District Court and Court of Appeals err in concluding that summary judgment was appropriate under applicable Florida law?

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Sup. Ct. R.10.

Cargill: In the Belly of the Beast by William Grigsby Vergara
http://www.envio.org.ni/articulo/4183

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Source URL: www.laborrights.org/stop-child-labor/cocoa-campaign/585

Source URL: www.ejfoundation.org/page152.html

Source URL: www.ktka.com/news/2006/nov/13/cargill_inc_facing_osha_citations_and_fi...

**Introduction**

The respondent has not quoted the Supreme Courts Rule number 10 properly. Therefore it is the respondent who misunderstands the role of the Supreme Court. Redress of grievances.

**Reasons for denying respondents reply.**

Respondent states that "A petition for a writ of certiorari will be granted **only** for one of the following compelling reasons:"[1] This is a misstatement of Rule 10. The rule actually states:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. **The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:**[2](Bold added for emphasis on missing phrase.)

With that being noted there is a conflict between Florida courts of Appeals and the decision of the US District Court for the Middle District of Florida. As stated in Rule 10 §(a).

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[1] Respondents reply brief page 5

[2] Sup. Ct. R 10.

**The US District Court for the Middle District of Florida and The District Court of Appeals' for the 11th Circuit decisions Do Conflict with the Decisions of the 1st District Court of Appeals the 2nd District, and the 5th District, of Florida.**

There is a conflict with Crawford v. Florida Steel 478 So.2d 855 (1985) (Fla.1st District), Austin v. Duval County School Board 657 So. 2d 945 (1995 ) (Fla.1st District), Venezia v. Eagan 671 So. 2d 175 ( 1996) (Fla. 5th District ),The respondent states that the parallel between Crawford and the present case is misguided, because there was no contract between the general and special employer,( in the Crawford case) in this case there is a detailed Service Agreement and in that agreement Section 8 states that the Company(Citrus Force Staffing) is considered an Independent Contractor.

> "Company shall act at all times as an independent contractor, and nothing contained herein shall be construed to create the relationship of principal and agent, or employer and employee between Company and Cargill. The Company employees assigned to perform the Services for Cargill are solely the employees of Company."[3]

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[3] Petitioners Writ Appendix F.

Clause 12 covers insurance responsibilities including workers compensation.[4] In Exhibit A of the services agreement is outlined the responsibilities of the Company including management and team leaders.[5] Therefore if in Crawford there was no service contract and the summary judgment was denied, then certainly with a service agreement that specifically states that the company is an independent contractor ( a material fact )again summary judgment should be denied.

> The three-part test for an employment relationship is: (1) whether there is a contract of hire, express or implied, between an employee and the special employer; (2) whether the work being done at the time of the injury is essentially that of the special employer, and (3) whether the special employer has the right to control the details of the work. *Stuyvesant Corp. v. Waterhouse, 74 So. 2d 554, 557 (Fla. 1954).* The contract for hire is the most important part of the test, because the employee loses the right to sue the special employer at common law for

[4] *Id.*
[5] *Id.*

negligence when he enters the new employment relationship. [6]

"[T]here is a presumption that the employee is not a borrowed servant, [*957] but instead continues to work for and be an employee of the general employer." *Sagarino v. Marriott Corp., 644 So. 2d 162, 165 (Fla. 4th DCA 1994)* [**8] (citing *Shelby Mut. Ins. Co. v. Aetna Ins. Co., 246 So. 2d 98 (Fla. 1971)*). To overcome this presumption, a party must establish the following elements: (1) there was a contract for hire, either express or implied, between the special employer and the employee; (2) the work being done at the time of the injury was essentially that of the special employer; and (3) the power to control the details of the work resided with the special employer. *Sagarino, 644 So. 2d at 165* (citing *Shelby Mut. Ins. Co., 246 So. 2d at 101, n.5*). The first factor, whether there was an express or implied contract, is the critical element. *Decogatis v. Fawcett Mem'l Hosp., 892 So. 2d 1079, 1081 (Fla. 2d DCA 2004)* (citing *Horn v. Tandem Health Care of Fla., Inc., 862 So. 2d 938, 940*

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[6] *Austin v The Duval County School Board*, 657 So. 2d 945 (1995)

*(Fla. 2d DCA 2004)*. The remaining two factors are indicia of such a contract. *Id.*[7]

There was limited access to certain equipment in the plant by Cromwell employees and there were actual Cargill employees' at the plant who were segregated from Cromwell employees and were responsible for maintaining certain equipment.

> the presumption of continued general employment makes particularly good sense in those situations where an employee is provided for the specific purpose of operating heavy equipment belonging to the lending employer because the lending employer, who owns expensive and often complex machinery, would naturally prefer to continue control and maintenance of that machinery, and thus be reluctant to lease his equipment without also sending along an employee who has knowledge of the equipment and an interest in seeing that the equipment is used and maintained properly.[8]

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[7] *Biggins v Fantasma Productions* 943 So. 2d 952 (2006)

[8] *Venezia v. Eagan* 671 So. 2d 175 (1996)

**There is conflict between the United States Court of Appeals for the Ninth Circuit, and the United States Court of Appeals for the Eleventh Circuit.**

In *Vasquez v. North County Transit District*, 292 F.3d, 1049 (2002), summary judgment was reversed because the protection that the defendant claimed (assumption of risk) was deemed not applicable. Therefore the decision of the United States Court of Appeals for the 11th Circuit in this case is in conflict with the United States Court of Appeals for the 9th Circuit.

**Petitioner believes that there is a conflict between this case and several states (including Florida).**
The respondent states that under 28 U.S.C. 1445(c), a civil action in any state court arising out of the workers' compensation laws of such state may not be removed to federal court.[9] However, in the instant case it was respondent that removed this case from state to federal court. The way that several states define their workers and employers are in direct contrast to the way that Florida defines workers and employers and the respondents reply states that

[9] Respondent reply brief page 11.

the US District Court for the Middle District of Florida used Florida Law to decide that summary judgment was appropriate for Cargill.

**Respondent is not trying to re-litigate the facts.**
Respondent in section C of the reply brief cites *Holmes v. Trout*, 32 U.S. 171, 210(1833) contending that new evidence was introduced however, this is not the case, petitioner has added the complete service agreement that the order from the middle district of Florida references on page two of the order.[10]
**The respondent states that there is no question of exceptional importance worth of this court's attention.**
However, as the petitioner stated in the appellate brief, there is a question of material fact that needs to be defined by this court.

> Even under the virtually certain test, there must not be a disputed issue of material fact in order for summary judgment to be given to the requesting party. If "The employer engaged in conduct that the employer knew, based on prior similar accidents or on explicit warnings specifically identifying a known

[10] Appendix E of Petitioners Writ.

> danger, was virtually certain to result in injury or death to the employee."[11] Summary judgment should not be given. However, at the time of Mrs. Young's accident, the standard was a different standard, a standard that allows a lower threshold to be met, the determination of conduct of the employer required the tryer of fact to decide "whether the employer either knew or should have known that its conduct was substantially certain to result in injury or death." [12]

"If the evidence raises any issue of material fact, if it is conflicting, if it will permit different reasonable inferences, or if it tends to **[*840]** prove the issues, it should be submitted to the jury as a question of fact to be determined by it." *Moore, 475 So. 2d at 668* (citations omitted). Trial courts must be especially cautious in granting summary judgment in negligence cases, and "summary judgment should not be granted

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[11] *Cabrera v. T.J. Pavement Corp.* 2 So 3d 996 Nov. 19, 2008.

[12] *Id.*

unless the facts are so crystallized that nothing remains but questions of [**6] law." Id.[13]

> [t]o the extent that the federal cases permit summary judgment based on *Federal Rule of Civil Procedure 56* as interpreted in *Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 265 (1986)*, they are of limited precedential value in Florida summary judgment cases. Florida [**16] places a higher burden on a party moving for summary judgment in state court, requiring the movant to: "[S]how conclusively that no material issues remain for trial." [14]

Respondent states that this case is an isolated ammonia release. However, the respondent had an ammonia spill in Minnesota in October of 2000.[15] Respondent had an ammonia spill before this incident and after this incident in

[13] *Bruno v. Destiny Transportation* 921 So. 2d 836 (2006)

[14] *Casamassima v. The US Life Insurance Co.* 958 So. 2d 1093 (2007)

[15] Appendix D of Writ for Certiorari.

March 2008 and has been accused of literally destroying the lives of its workers.[16]

> ...an accident is classified according to Cargill's universal lexicon not as a "lost-time accident" but as "first aid," a "slight accident without time off" and the worker is relocated "with his/her consent" and with signed documentation to an area where he/she can work without discomfort to the injured body part.[17] The subcontractors do the most dangerous work. They are the Cargill employees who die every year all over the world because they work without any kind of security. They are the ones who prune trees, clean toilets and lift heavy sacks. They do all the jobs with a higher probability of a serious or deadly accident. They work on scaffoldings, in silos and with machinery where it's easy to get

[16] Cargill: In the Belly of the Beast by William Grigsby Vergara http://www.envio.org.ni/articulo/4183

[17] *Id*

> hurt. They work in their own country like migrants who work abroad do- for less pay and without rights. They are the ones who die anonymously,...[18]

Cargill is being sued for knowingly sourcing from cocoa plantations that use child slave labor.[19]

> The federal government and ten states sued Cargill Inc. for failing to comply with emissions standards outlined in the Clean Air Act. The lawsuit came after the discovery that Cargill's corn processing plants were a major source of carbon monoxide and volatile organic compounds. The company reached a settlement in the suit by agreeing to spend $130 million to upgrade the pollution control devices at its plants. In addition, Cargill agreed to pay $1.6 million in civil penalties and to

[18] Cargill: In the Belly of the Beast by William Grigsby Vergara http://www.envio.org.ni/articulo/4183

[19] www.greenamericatoday.org

earmark $3.5 million for environmental projects across the country. Improved pollution controls at Cargill facilities are expected to reduce annual emissions by 30,000 tons.

-- Environmental Protection Action, 09/01/2005[20]

An affidavit released by Immigration and Customs Enforcement (ICE) in March 2009 alleged that the Cargill Meat Solutions plant in Dayton, Virginia knowingly hired around 400 "unauthorized and smuggled aliens." The affidavit was used to secure a search warrant for a March 2008 raid of the plant after it was found that nearly one third of the 1,300 I-9 employment forms submitted to the Department of Homeland Security by Cargill were suspected to have been filled out using "fraudulently obtained or invalid documents." ICE investigators also found

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[20] yosemite.epa.gov/opa/admpress.nsf/2467feca603687298525735900404443d/f36...

evidence that pregnant women were also treated differently in the plant, being forced to work up until they gave birth and made to start working again soon after delivery.

-- WHSV, 04/22/2009[21]

The International Labor Rights Fund (ILRF) has sued Nestlé, Archer Daniels Midland, and Cargill in Federal District Court in Los Angeles for involvement in the trafficking, torture, and forced labor of children who cultivate and harvest cocoa beans that the companies import from Africa. They filed suit on behalf of a class of Malian children who were trafficked from Mali into the Ivory Coast and forced to work twelve to fourteen hours a day with no pay, little food and sleep, and frequent beatings. The three children acting as class representative plaintiffs are proceeding anonymously as John Does

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SourceURL: www.whsv.com/news/headlines/43439297.html

because of feared retaliation by the farm owners for whom they worked.

-- International Labor Rights Fund, 07/13/2005[22]

According a report by the Environmental Justice Foundation, a London-based nonprofit dedicated to stopping environmental abuses, titled "White Gold: The True Cost of Cotton," an Environmental Justice Foundation report, the Cargill Cotton division of Cargill Incorporated is a major purchaser of Uzbek cotton. Government control of the lucrative cotton industry in Uzbekistan has led to widespread human rights abuses and extreme poverty. International human rights organizations warn that leaders of Uzbekistan have turned the country into a "slave nation" in order to cheaply produce cotton for the world market. According to the Environment Justice Foundation, Uzbekistan is the world's second largest

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[22] Source URL: www.laborrights.org/stop-child-labor/cocoa-campaign/585

exporter of cotton, earning the country more than $1 billion in exports annually. The Karimov government employs unethical and abusive policies to reap the maximum benefit from Uzbekistan's desirable natural resource:

- Every year, over 200,000 children are conscripted to manually harvest cotton. Schools are closed and children as young as seven are forced to inhabit camps on cotton farms. The children are given high picking quotas and most are not compensated for their labor. They subsist on bread and water, and many suffer from malnutrition as a result of hard labor and little food. Adult laborers typically earn less than $7 USD per month. [23]

- On June 14, 2006, Scott Grossoehme, a Cargill employee in North Topeka, died in a grain elevator accident. As a result, the Occupational Safety and Health Administration (OSHA) fined Cargill $22,500 for seven alleged violations of

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[23] Source URL: www.cfoundation.org/page152.html

> federal rules, including a failure to adequately train employees, exposing them to the risk of being buried by the grain, and not providing lifelines to employees who walk or stand in stored grain. This was the second death in Cargill elevators in less than three years. [24]

## Conclusion

For all of the above reasons, the petitioner asks this honorable court to grant the petition for writ of certiorari.

Respectfully submitted,

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[24] Source URL: www.ktka.com/news/2006/nov/13/cargill_inc_facing_osha_citations_and_fi...